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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-201

CITY OF RICHMOND, VIRGINIA,
Appellant,

v.

UNITED STATES OF AMERICA and
WILLIAM B. SAXBE, ATTORNEY GENERAL, and
CURTIS HOLT, SR. et al. and
CRUSADE FOR VOTERS OF RICHMOND, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES, CURTIS HOLT, SR., et al.

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TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

QUESTION PRESENTED 2

STATEMENT

I. INTRODUCTION 3

II. GENERAL BACKGROUND 4

III. ATTEMPTS BY CITY AT POPULATION EXPANSION 5

1. Merger 5

2. The Henrico Annexation Case 6

3. Interim Period Between Henrico and Chesterfield Trials 7

4. Contemporaneous Events During the Interim Period 8

5. The First Chesterfield Trial on the Merits 9

6. Events Between the First and Second Trial: Compromise 9

7. The Compromise (Annexed Area) Was an Economic and Administrative Loss 11

8. The Appeal Problem: Protect the 1970 Election 12

9. The Decision of the Annexation Court 13

10. The Appeal 15

11. The Next Election: 1970 16

IV. COURSE OF LEGAL PROCEEDINGS 16

V. THE DECISION BELOW 19

VI. SUMMARY OF ARGUMENT 21

Page

VII. ARGUMENT 23

A. The Economic and Administrative Benefits/Losses of the Annexation 23

a. Are Economics and Benefits Relevant to this Case? 23

b. Was the Economic Benefit Issue directly litigated below? Did the City prove any objectively verifiable, legitimate reasons for the annexation? Did defendant intervenors have a full opportunity to rebut such evidence? 25

1. Was the issue of objectively verifiable purpose directly litigated? 26

2. Did the annexation have an objectively verifiable legitimate purpose? 28

(a) The question of vacant land 29

(b) The question of fiscal impact 31

(i) Expenditures 33

(ii) Revenues 35

(iii) Net loss or gain 36

B. De-Annexation is an Effective and Reasonable Remedy 37

C. The City's Ward Plan and Ward Plans in General are Ineffective as a Remedy in the Context of a Purposeful Dilution by an Illegitimate Annexation 41

1. The population percentage shell game 41

Page

2. Access to the political process, not population, is the barometer of dilution 42

3. Ward plans are a wholly inadequate remedy 43

4. The ward plan is not a correct, fairly-drawn plan 46

D. The question of purpose was not settled in the appeal of Holt I 48

1. The court below was not limited and did not limit itself to consideration of the evidence regarding purpose developed in Holt I Appeal but considered additional, competent and persuasive evidence of the City's continuing and impermissible purpose 49

2. All parties in Holt I and the Holt I appellate court agreed that the appellate court had no jurisdiction to consider any question arising under the Voting Rights Act 51

3. The application of the principles of *res judicata* and collateral estoppel to the instant case would work a profound injustice 54

4. Congressional policy indicates a clear intent to invest the court below with the exclusive and overriding obligation to inquire into the issue of the purpose underlying a covered change in voting practice and procedure 58

E. The "extra burden" argument of the City is a quibble of semantics 59

Page

F. The District Court did not improperly and erroneously ignore the Attorney General's approval of the City's Nine Ward Plan 61

G. The Court below made its findings of fact upon a voluminous record which fully supported its determination that Richmond had not complied with the Act 63

H. Conclusion 64

TABLE OF AUTHORITIES

Cases:

Allen v. State Board of Elections, 393 U.S. 544 ....25, 52, 57, 60, 62

Beer v. United States, 374 F. Supp. 363 (Beer II) (D.D.C. 1974) 43, 47

City of Petersburg v. United States, et al., 354 F. Supp. 1021 (D.D.C. 1972), aff'd, 410 U.S. 962 .24, 44, 59

City of Richmond v. County of Chesterfield, Circuit Court of Chesterfield County, July 1, 1969, writ of error refused sub nom., Deerbourne Civic and Recreation Association v. City of Richmond, 210 Va. li (1970); cert. denied, 397 U.S. 1038 7

Ex Parte Virginia, 100 U.S. 339 58

Georgia v. United States, 411 U.S. 526 ..... 42, 45

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 37

Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970) 56

Holt v. City of Richmond, et al., 334 F. Supp. 228, 459 F.2d 1093 (4th Cir. 1972), cert. denied, 408 U.S. 931 (Holt I) ..... *passim*

Holt v. City of Richmond, Case No. C.A. 695-71-R (E.D. Va.), stay granted, 406 U.S. 903 (Holt II) .... *passim*

Page

Irving Nat'l Bank v. Law, 10 F.2d 721 (2d Cir. 1926) 56

Perkins v. Matthews, 400 U.S. 379 ..... 59, 64

South Carolina v. Katzenbach, 383 U.S. 301 ..... 57, 58

Stebins v. Keystone Insurance Company, 481 F.2d 501 (1973 C.A.D.C.) 54

Watson v. Memphis, 373 U.S. 526 24

Whitcomb v. Chavis, 403 U.S. 124 43

White v. Register, 412 U.S. 765 43

Zimmer v. McKeithen, 467 F.2d 1381 (5th Cir. 1972) 43

Constitution and Statutes:

United States Constitution, Amend. XV ..... *passim*

Code of Virginia § 15.1-1032 et seq., Title 15.1, Ch. 25 (1973) 5

Code of Virginia § § 8-475 & 463 12

Section 5, 42 U.S.C. § 1973c Voting Rights Act of 1965, as amended, (1970) ..... *passim*

Miscellaneous:

Collateral Estoppel by Judgment 66 Harv. L.Rev. 1 54

Note, Developments in the Law – Res Judicata, 65 Harv. L.Rev. 820 (1952) 56

Restatement, Judgments § § 68, 69 & 70 ..... 51, 54

Rules of Supreme Court of Appeals of Virginia, Rule 5:4 12

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OPINION BELOW

The opinion of the special three-judge District Court for the District of Columbia is reported at 376 F.Supp. 1344 (DDC 1974). Copies of the judgment and the

opinion of the District Court, the Findings of Fact and the Conclusions of Law of the Special Master appointed by that court are found in Appendices A, B, and C of Appellant's Jurisdictional Statement.

JURISDICTION

The judgment of the District Court was entered on June 6, 1974. Notice of Appeal was filed July 15, 1974. The Jurisdictional Statement was filed August 29, 1974. Probable jurisdiction was noted December 16, 1974. Jurisdiction to review by direct appeal is conferred by 42 U.S.C. § 1973c (1970).

STATUTE INVOLVED

Section 5 of the Voting Rights Act, as amended by Act of June 22, 1970, 84 Stat. 315, 42 U.S.C. § 1973c (1970), is set forth in Appendix D to Appellant's Jurisdictional Statement.

QUESTION PRESENTED

Whether the District Court properly found that Appellant failed to prove (in its suit for Declaratory Judgment) that a compromised annexation (even as modified) of an adjacent county did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color, where: (a) the original purpose of the annexation had

been to maintain a white majority in the City's at-large elections; (b) there was and is no objectively verifiable, legitimate purpose or reason for, or justification to retain the annexation, and; (c) the suggested modification substantially limits the pre-annexation voting potential of the black citizens, further polarizes the races, and does not to the extent reasonably possible eliminate the impermissible effect, and itself serves an impermissible purpose.

STATEMENT

I.

INTRODUCTION

The City of Richmond, Virginia, is a political subdivision of the Commonwealth of Virginia, subject to the provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973(c).

The factual setting is simple. The white power structure of Richmond was fearful of losing control over city government because of the growth of black voting strength. They purposely compromised a pending annexation to quickly secure 45,000 new white citizens in time to dilute the black vote enough to maintain political control. There were no other reasons for acceptance of the compromised annexation.

The appellant then knowingly and wilfully failed to seek Section 5 approval. After being refused assistance from the Department of Justice, appellees Holt, et al. filed a Fifteenth Amendment suit to challenge their

disenfranchisement and later (December 1971) filed a Section 5 suit. On appeal (May 1972) the Fourth Circuit, after first specifically excluding *any* Section 5 considerations, reversed the District Court. Appellees reactivated their separately filed Section 5 suit and sought to enjoin any further elections. This Court granted that injunction in April of 1972. Days before the motion for summary judgment was to be heard in that Section 5 suit, appellant filed for approval in the court below in this action. The Section 5 local District Court stayed action on the motion for summary judgment pending a decision by the court below in this action. After the taking of extensive evidence, and its consideration by a Special Master and the court below, appellant's belated request for approval of its voting change was denied.

The Holt appellees' action in the local District Court to enjoin further enforcement of the annexation is still pending.

II.

GENERAL BACKGROUND

Unlike all other states in the Union, Virginia law makes each city and county a separate, distinct, political subdivision. The City of Richmond is surrounded by two counties. Henrico County wraps around the city to the north from east to west, while Chesterfield County wraps around the city to south from the west to east.

There are only two ways for a Virginia city to expand its population other than by birth and immigration. It must seek either to merge with an adjacent county or it must seek to capture that population contained within adjacent geographical areas by way of Virginia's annexation statutes. Va. Code Ann. § 15.1032 *et seq.*

The city captured an additional 47,262 citizens (only 555 of whom were black) contained in a twenty-three square mile area (J.A. p.61) when in July 1969 a three-judge state annexation court approved and adopted verbatim all terms and conditions of a compromise agreement between the white councilmen in control of the city and the County of Chesterfield in settlement of the suit by the city against the county. (H. Tr. 179).

There are fifteen elected officials of the City of Richmond, to-wit: City Treasurer, Commissioner of Revenue, City Sheriff, Attorney for the Commonwealth, Clerk of the Circuit Court, Division I, Clerk of the Circuit Court, Division II, and nine members of City Council. (J.A. p.260)

III.

ATTEMPTS BY CITY AT POPULATION EXPANSION

1. Merger

In 1960, the City of Richmond and County of Henrico entered into negotiations from which evolved a

plan of merger of the two political subdivisions. (H. Tr. Vol. 3, 364-65).

In seeking support from county leaders, city officials stressed a theme that without merger the city would become a city of old, poor, and black, and laid special emphasis on the "problem" of the growing black population. (H. Tr. 236-37).

The black citizens were specifically concerned with expansion in that it would dilute what little control, influence, and participation they had been able to achieve in the political process. (H. Tr. 53-4)

The merger plan was rejected due to a large negative vote in the county by referendum December 12, 1961. In the city, 100% of the black voter precincts voted against the merger; 68% of the racially mixed precincts voted against the merger, and; 95.7% of the white precincts voted for the merger. (J.A. p. 76)

On December 26, 1961, the city exercised its second option to achieve population expansion and adopted ordinances to proceed with annexation suits against Henrico and Chesterfield. (HCX 9[a] [b])

2. The Henrico Annexation Case:

On April 27, 1964, the Henrico Annexation Court awarded the City 45,310 citizens, 98.5% of whom were white. During this time, no action was taken to proceed with the Chesterfield annexation case.

Cities in Virginia may raise monies for operations by the issuance of bonds and the collection of taxes. Virginia municipal bonds can be of two types: general obligation bonds and revenue bonds. Revenue bonds can only be used for capital improvements which generate revenues such as utility expansions. Subsequent

to the award, it was discovered that the City Charter did not allow the issuance of general obligation bonds to pay for the costs of annexation. (H Tr. Sept. 24, 19-20) Consequently, the city rejected the Henrico annexation award on March 8, 1965. (Tr. 691, Sept. 24, 12)

3. Interim Period Between Henrico and Chesterfield Trials

Shortly after the rejection of the Henrico annexation award, officials of the city, representing white interests, contacted officials of Chesterfield County to discuss the dormant Chesterfield case, now some four years stale (having been filed at the same time as the Henrico suit) in order to effect a compromise of the pending suit. H Tr. 92, 146) The *sole* basis for negotiations with the county officials was the number of *white citizens* they could expect to receive. A base figure of 44,000 was proposed by the city officials. (H Tr. 151, 152, 94-95)

These negotiations bore no fruit.

November 5, 1965, the city revived the dormant suit, which was dismissed on March 25, 1966. The appeal took a leisurely course, consuming 17 months and 14 days, before a decision was handed down by the Supreme Court of Appeals of Virginia on September 8, 1967, reversing the dismissal. (*City of Richmond v. County of Chesterfield,* 208 Va. 278 [1967]) The parties agreed to a moratorium on proceedings through June 15, 1968, while the Virginia General Assembly was in session.

Trial on the merits was begun September 24, 1968.

4. Contemporaneous Events During the Interim Period

There has been a long history of racial segregation and discrimination in the City of Richmond. By various devices in the past, black citizens have been restricted in their ability to participate fully in the political arena by official and unofficial limitations on their voting and political participation. (H Tr. 9, 12, 16, 17, 18, 19) Vast changes were being wrought in the voting strength of the black citizens of Richmond during the interim period following the repeal of the poll tax. Two political forces began to emerge. Richmond Forward was the white voter organization. The black voter organization was known as the Crusade for Voters. (H Tr. 9) Voting patterns in the City of Richmond have always followed racial bloc voting and continue to do so today. (MTR 544, 545, 583, 584) The 1966 Councilmanic elections were the first elections held after the lifting of the poll tax. (H Tr. 25) For the first time two candidates not supported by the white voter organization but supported by the black voters were elected to City Council. The rapid and effective growth of the black voting power was known to the white voter organization which conducted surveys and analysis of the 1966 and 1968 elections. (J.A. p. 78, 104; HHX 5a and b)

In response, legislation was introduced in the next legislative session (1968) to force merger of Richmond, Henrico and Chesterfield by the formation of a commission later known as the Aldhizer Commission. (H. Tr. 663, 209, 223) This commission considered its role as that of preventing Richmond from becoming black controlled by increasing the number of white

voters in the city through forced merger. (H. Tr. 212, 214, 217, 218, 220, 221, 223) Just prior to the first meeting of the commission, the 1968 Councilmanic elections were held and the black citizens again increased their representation, this time to three numbers. (HHX 39: H. Tr. 210) White city officials urged merger of Chesterfield and the surrounding counties through the commission, expressing fear of a black takeover by at least the next Councilmanic election scheduled for 1970. (H. Tr. 21, 213, 216, 223)

5. The First Chesterfield Trial on the Merits

Meetings of white officials with County officials continued on an irregular basis since 1965, with the aim of settling the suit. In all meetings, the city maintained a consistent position that required all negotiations to center on and be concerned with the number of white people that the city would receive by settlement. All economic, geographical and other considerations were simply not discussed or were brushed aside. In the words of the City Manager, the City had to "balance the population." The acceptable minimum number remained relatively constant at 44,000 people. The city was careful to ascertain from county officials the racial percentage figures relevant to its stance in the negotiations. The meetings bore little fruit. (Tr. 92-112; 146-179; 584)

On January 9, 1969, the presiding judge declared a mistrial and disqualified himself. (Tr. 111)

6. Events Between the First and Second Trial: Compromise

Shortly after the mistrial, a special session of the Virginia Legislature met to draft and adopt a new

constitution for the State. The Aldhizer Commission introduced a bill, commonly referred to as the Aldhizer Amendment, to create a third and new method of increasing the population of the city. The Amendment allowed the state legislature to expand Richmond's boundaries every ten years. (H. Tr. 117) Passed during this session of the legislature was a bill amending the City Charter of Richmond to allow general obligation bonds to be used to pay for the costs of annexation (H. Tr. 40, 42, 64-66), thereby removing the problem which had aborted the Henrico annexation. City officials lobbied extensively for the Constitutional Amendment on the ground that should the Amendment fail, the city would go black, i.e., the plaintiff class would elect sufficient representatives to control the city by at least the next election scheduled for June of 1970. (H. Tr. 222, 223, 143) The Aldhizer Amendment passed but had to be passed again at the next session (1970) before becoming law. (Tr. 223)

Subsequent to its passage, negotiations resumed and continued into the second trial on the merits. No line was actually drawn until the Mayor of the city, Mr. Bagley, had assurances that at least 44,000 white people would be given up by the county. On May 15, 1969, Mr. Bagley and Mr. Horner, chairman of the County Board of Supervisors, drew a line (commonly called the Horner-Bagley Line) which encompassed the required number of white people. (H. Tr. 120, 174)

At the time the agreement was formalized, the City Council and the Mayor had no information by which they could evaluate in any respect a compromise line agreement, other than its size and the number of people it contained. (H. Tr. 119, 120, 172, 178, 194, 234,

319-21, 356, 428, 445, 524, 575, 577, 581, 582, 584, 585-86, 710, 711; Sept. 24, 148, 155, 156, HHX 13 and 15) Mr. Talcott, the City Boundary Expansion Co-ordinator who gathered and had available all information concerning vacant land, economics, tax, schools, utilities, etc., was not consulted for any information whatsoever concerning a compromise by either the Mayor, the City Council, or the attorneys in the suit, until after the compromise had been reached. In fact, Mr. Talcott was not even aware such a compromise had been reached until some eleven days after the fact (H. Tr. 436)

7. The Compromise (Annexed Area) Was An Economic and Administrative Loss

A former councilman, who was knowledgeable in the city affairs, head of a leading regional financial firm (Wheat & Co.) intimately connected with municipal finances, and a participant in almost all the compromise negotiations prior to formulating the Horner-Bagley Line, argued strenuously against the agreement on the grounds that the agreement gave the city no vacant land and nothing but people. (H. Tr. 34, *et seq.*)

Prior to the compromise, the City had 6.6% net vacant land. (ATR Vol. 2, p. 6) After the compromise annexation, the city had 6.53% net vacant land. (See table p. 31 herein) The annexed area costs the city 23.8 million dollars a year against total income of between 14.5 to 21 million dollars. Thus, the city annually loses an average of 9.5 million dollars. (see table p. 36 herein)

8. The Appeal Problem: Protect the 1970 Election

At all times, and in all such negotiations leading to the compromise, the Mayor was in constant contact with the six white Councilmen for his negotiating authority. These white representatives, however, systematically excluded from their meetings and conferences all council representatives of the black citizens. The latter knew nothing of the compromise, of the policy questions involved in it, or of the Aldhizer Amendment until after these matters became public knowledge. The exclusion continued throughout the trial of Holt I to the extent that even the attorneys for the city failed to consult or advise this council minority on any facets of the respective cases. (H. Tr. 64-68, 69-71, 81, 102, 215-216, 226, 227, 241, 350, 353, 423, 424, 433-35, 563, 567, 570-72, 611-14, 619-21; Sept. 24, 39)

Time was not of the essence. (H. Tr. 110-111) Under Virginia appeal procedure, appeals have four months in which to be filed and normal procedures required a total of five months before the appeals court would be in a position to decide if it would hear the appeal. (Rules of Supreme Court of Appeals, Rule 5:4, Va. Code §§ 8-475 and 8-463) If a court decision was not reached by July, the appeal could well run into 1970 on procedural steps alone before a decision of any sort could be rendered. The trial was still proceeding and all parties agreed it would be the end of June before the suit's original parties rested, with the intervenors yet to be heard from.

In Virginia, annexations can only take effect on the first day of each year. If delayed, the annexation would not become effective until after the next scheduled

election in 1970. (H. Tr. 649-50) White representatives were fearful that should they lose control of Council, a black controlled Council would drop the case, or refuse to accept an award of the Court or the compromise. (H. Tr. 23, 25-26)

Accordingly, on June 11, 1969, Mr. Bagley and his attorney, Mr. Davenport, met with Mr. Horner and his attorney to firm up the agreement, for the expressed purpose of assuring that the annexation would take effect January 1, 1970, in order that the newly acquired white citizens could vote and thus protect white control of the next scheduled election for City Council set for June 1970.[1] (Tr. 172-179)

9. The Decision of the Annexation Court

The second annexation trial had begun the same day the Horner-Bagley Line was agreed upon: May 15, 1969. The court itself had allowed racial testimony and was aware of the city's fear of a growing black population (H. Tr. 136-138, 642-43), as evidenced by its opinion when it stated: "Obviously cities must in some manner be permitted to grow . . . in population or they will face disastrous social problems." The

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[1] It is significant to note that as early as August of 1971, attorneys for the City, Edwards, Mattox and Davenport, knew of the testimony surrounding the compromise and the Aldhizer hearings and the part they themselves had played in them. Yet these key witnesses, whose involvement in the entire matter traceable from the very beginning, have remained as counsel of record in this case, Holt I nd II and failed to offer themselves as witnesses at any point to rebut or contradict this evidence, and even today remain so cloaked in silence.

annexation court also recognized that it "exercised not only judicial, but also some legislative functions." (J.A. p. 40, HCX 20[a]) The annexation court also noted that the compromise was unprecedented in an annexation suit and stated that while it was not bound by such compromise legally, it was so bound in practice, when it said:

> After mature consideration, we feel that the agreement is entitled to great weight. It must be remembered that the parties to the agreement perform the legislative functions of their governments as duly elected representatives for the people. When they decide that their constituents are benefiting by an action, such a decision should not be treated lightly . . . The acquisition of . . . some 43,000 people would solve many of the City's problems both now and for some time to come . . . In sum, we believe that the boundary line set forth in the agreement should be the annexation line and that all terms and conditions specified should constitute the conditions of annexation *verbatim*, and we so adjudge and decide. [emphasis added]

Thirteen days prior, the court had agreed to the compromise in a secret conference, saying, "let us hear the protestors [intervenors] and then you can tell us what your agreement is and *we can make our decision accordingly*, and in that way the intervenors won't feel like they have been kicked around or left out . . ." [emphasis supplied] (J.A. p. 40, HCX 20[a], ATR p. 3234-20)

In a secret meeting the court itself recognized the doubtful propriety of what it was doing when it said, "I just don't want the press getting hold of what we

have been talking about in here because the whole thing will just – it would be wrong." (ATR p. 3234-19)

10. The Appeal

The notice of appeal was filed by the intervenors on the last permissible day, September 10, 1969. (HCX 24) The petition for a writ of error was filed five days before the last deadline on November 7, 1969. The city's brief in opposition was filed on November 12, 1969, the reply brief on November 20, 1969, a Thursday. The next day, counsel were notified to argue the following Monday afternoon on November 24th. The court denied the petition on November 26, 1969.[1]

A stay was filed for by the appellants on December 19, 1969, and denied that same day. An application for a stay was then made to the United States Supreme Court which was denied by Mr. Justice Douglas on December 31, 1969.

The following day, January 1, 1970, the annexation took effect.

Prior to January 1, 1970, the racial composition of the City of Richmond had been 52% black and 48% white. Subsequent to January 1, 1970, the racial composition was exactly as it had been January 1, 1960, i.e., 42% black and 58% white. (J.A. p. 61, HHX 2)

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[1]This was the only time in the history of the Virginia Supreme Court that certiorari was denied in an annexation case. This was the only annexation case that was ever compromised and settled. The average waiting period between briefing and argument until decision on cert. ranges between 2-6 months in the Virginia Supreme Court.

11. The Next Election: 1970

On June 10, 1970, a Councilmanic election was held which included the newly annexed voters without the City's having secured approval under Section 5 of the Voting Rights Act of 1965. The black citizens elected three representatives. Had the annexed votes not been counted, four representatives of the black citizens would have been elected, giving them fiscal control of the City Council (appropriation measures must be approved by at least six votes). (H. Tr. 27, 78-79)

IV.

COURSE OF LEGAL PROCEEDINGS

On February 24, 1971, Curtis Holt, Sr., a Negro citizen of the City of Richmond, filed a class action against the City of Richmond, after unsuccessfully attempting to secure the aid and assistance of the Attorney General.

The suit alleged that the aforementioned annexation diluted the vote of the plaintiff class, that the dilution was intentional and purposeful, and was in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. No question of the Voting Rights Act was raised.

On May 7th, the United States Attorney General objected to the annexation, approval for which had been requested by the City on June 28, 1971, and which application had been objected to by Holt and the Crusade. No further formal action was taken by the

Crusade or the Government until their appearance in the instant cause.

On June 1, 1971, Answers to the Complaint were filed and, over the objection of the plaintiff, the preliminary hearing was consolidated with the hearing on the trial on the merits set for September 20, 1971.

Trial on the merits was begun on September 20, 1971, and concluded on September 24, 1971. On September 28th findings of fact were announced from the bench. At the conclusion thereof, the defendants moved orally for the taking of additional evidence. Over the objection of the plaintiff on October 12, 1971, the District Court granted said motion and set October 19 and 20, 1971 for the taking of additional evidence on the question of the practicality of de-annexation and other remedies after announcing that the plaintiff class was entitled to relief.

Plans were filed by defendants for remedies other than de-annexation, and argued at the October 19th and 20th hearing.

On November 20, 1971, the District Court filed a Memorandum of its findings of fact and conclusion of law. On November 23, 1971, the Court entered its Order. A stay of the Order was granted by the Fourth Circuit Court of Appeals on December 8, 1971. A Petition to Vacate the Stay was filed by Holt with the United States Supreme Court on December 9, 1971, which Petition was subsequently denied.

Also on December 9, 1971, Holt filed an action in the District Court for the Eastern District of Virginia, pursuant to Section 5 of the Voting Rights Act, seeking a judgment that the annexation was without effect for lack of prior approval by the Attorney General or the

United States District Court for the District of Columbia. This cause, often referred to by the litigants as Holt II, was filed before a statutory three-judge court. This cause was stayed, pending appeal of the first Holt suit.

On March 15, 1972, Holt filed for an injunction in Holt II against the City to prevent an election for City Council scheduled for May 2, 1972.

On April 4, 1972, the Holt II court denied the injunction. Holt immediately filed an application to enjoin the elections before the United States Supreme Court and on April 24, 1972, Chief Justice Burger, with Justices Blackmun and Rhenquist concurring, wrote the opinion of the Court granting Holt's application for injunction.

On May 3, 1972, the Fourth Circuit reversed the District Court on the grounds that motive and purpose of legislative bodies could not be examined under a pure Fifteenth Amendment claim, and expressed knowledge of the Holt II case, saying that their opinion in no way applied to the issues surrounding the claim under the Voting Rights Act.

On May 4, 1972, Holt filed a Motion for Summary Judgment in Holt II.

On August 25, 1972, the instant action was filed by the city, five days prior to the scheduled hearing on Summary Judgment in Holt II.

On October 11th, Holt again appeared in Holt II to enjoin elections for constitutional officers and all future elections which Order was granted that day.

A decision to stay proceedings in Holt II was entered February 14, 1973. This decision kept the Summary

Judgment under advisement pending final decision in the instant cause.

The instant case was referred to a special master who took evidence by stipulation of the record in Holt I and the original annexation trial and held a hearing for additional evidence on October 15, 16, and 17, 1973. The master filed his opinion January 21, 1974, in which he recommended deannexation. (See J.S. City, Appendix C)

V

THE DECISION BELOW

The District Court, after reviewing the special master's findings, concluded, "far from being 'clearly erroneous,' [the finding] was *compelled* by the record before the Master" that the annexation plan as amended has the purpose and effect of diluting the black vote in Richmond. (J.S. App. B, p. 3b)

The Court stated that since the original annexation was racially motivated, the City would have to demonstrate "by substantial evidence (1) that a ward plan not only reduced, but effectively eliminated the dilution of black voting power caused by the annexation[46], and (2) that the City has some objectively verifiable, legitimate purpose for annexation." [Footnote 46 read: "The *Petersburg* court was fully aware that the 'calculated to neutralize to the extent possible' standard which it established for annexations not motivated by a discriminatory purpose requires a city to minimize but not necessarily to

remove entirely any dilution of black voting power caused by the annexation." (J.S. App. B, 20b])

The Court found that the City failed to meet its burden but that "it appears that the white political leadership presently in control of Richmond *adopted the ward system* for the purpose of doing what they could to maintain the dilution of the black vote produced by annexation." (J.S. App. B, 27b)

The Court further noted that "[b]ecause of our understanding of the political importance of obtaining a majority on the City Council, we have not included in our analysis the effect . . . on the election of the City's five 'constitutional officers': Commonwealth's attorney, city treasurer, commissioner of revenue, sheriff and clerk of court. These officers . . . are of necessity elected on an at-large basis. Thus with respect to these officers, the ward system does nothing to counteract the dilution of the black vote caused by annexation." (J.S. App. B, fn. 61 p. 26b-27b)

The Court also noted that "blacks would have a greater opportunity to elect five councilmen [a majority] responsive to their concerns and interest in an at-large system within Richmond's old boundaries then in a ward system operating within the expanded boundaries." (J.S. App. B, p. 26b)

The Court thus denied the City's request for declaratory judgment, but stopped short of affirmative relief. The Court correctly noted its inherent power to do so (J.S. App. B, p. 34b), and commented on Holt's request to enjoin Richmond to de-annex and hold immediate elections, saying "there are strong equities in favor of such an injunction." (J.S. App. B, p. 30b)

VI.

SUMMARY OF ARGUMENT

The City's arguments have as their central core or underlying assumption that this annexation serves an objectively verifiable, legitimate purpose. The Government's arguments include this assumption, but also maintain that this issue was not directly litigated below. Therefore, the arguments will address these issues first. There is simply no factual basis to say that the economic issue was not directly litigated. Over 7,000 pages of testimony are in the record on the economics of the original annexation; four days of testimony dealt directly with this annexation compromise; and further evidence and testimony was taken by the Master. The master and court had before it approximately 8,500 pages of testimony and hundreds of exhibits.

This case arises under Section 5 of the Voting Rights Act of 1965, which section requires the City to establish that its 1970 annexation and subsequent proposed modification of the at-large system of municipal elections to single member districts does not have the purpose or effect of denying or abridging the right to vote on account of race or color.

The City proceeded with the annexation without approval of the Attorney General or the District Court for the District of Columbia. The annexation was accomplished for the purpose of diluting the vote of black citizens in the City.

Cities may have legitimate economic reasons to expand their boundaries into areas which coincidentally

contain many more white than black citizens. Where the city can show it was not motivated by a desire to dilute and that its desire to expand was legitimate, a ward plan calculated to minimize any resultant dilution could save that annexation from illegality under Section 5.

Thus, the City would have to show some objectively verifiable, legitimate purpose for the annexation to justify allowing the City to retain it. After meeting that burden, the City would still have to then demonstrate a voting plan which neutralized to the extent possible the resultant dilution as it affected municipal elections.

If the City failed to meet this burden, then the annexation would have to be prohibited.

The effect of this ruling would not in any way limit or make more difficult annexations by cities in the future.

As Judge Butzner so cogently noted in *Holt v. City of Richmond*, 459 F.2d 1093, 1108:

> Divestiture [de-annexation] is not intended to freeze the racial composition of Richmond's population. This composition will change freely as white and black people move in and out of the city. Moreover, *the relief I would grant is not designed to deny Richmond, or any other city, the right to expand its boundaries through annexation, or otherwise, even though such expansion may adversely affect the voting power of one race or another.* Annexation is a legitimate means of improving the economy of a city and the quality of its environment. The Constitution, I believe, does not forbid a city to expand its boundaries, even though enlargement may have the collateral effect of modifying its racial composition. *The remedy I suggest [de-annexation/divestiture] is*

> *intended to prevent city officials, black or white, from deliberately and intentionally employing annexation laws to dilute the voting rights of any race.* [emphasis supplied]

Here the City failed both its first burden of showing despite its intentionally dilutive purpose, that this annexation had any objectively verifiable, legitimate purpose, and its second burden of showing that the proposed modification neutralized to the extent possible any impermissible effect and further even failed to show that the proposed ward plan was not itself racially motivated to maintain white control.

The annexation actually left the City in a worse position economically and for future growth; and its ward plan further diluted the black voting potential, creating a greater polarization of the races than did the initial dilution.

VII.

ARGUMENT

A. The Economic and Administrative Benefits/ Losses of the Annexation

a. Are Economics and Benefits Relevant to this Case?

The City argues in their second assignment of error that this case concerns not an abridgement or denial of constitutional rights by the change in black voting strength, but that the change was merely "incidental to achieving different, legitimate governmental goals attain-

able only through annexation." The City then characterizes this as a "legitimate annexation." (Brief for appellant, pp. 34, 35)

If such a legal position is maintainable, then the crux of that issue perforce must be the factual determination of whether the instant annexation was "legitimate." That is, did the City have "some objectively verifiable, legitimate purpose for annexation" (J.S. App. B, p. 20) as required by the District Court below or as put by the Court in *City of Petersburg v. United States*, 354 F.Supp. 1021, 1024, was "the annexation as carried out . . . fairly intended to accomplish a legitimate governmental purpose"?

Thus, the City cannot be heard to complain of error when the District Court below explored the very factual question which, if determined in their favor, could support their contentions. Yet complain they do in Argument V (App. Br., 51) that findings that the City "failed to establish any counter-balancing economic or administrative benefits of annexation" were "irrelevant." In support of that contention, the City states as a proposition that "this is a question of constitutional rights, upon which economic and administrative issues have no bearing. *Watson v. Memphis*, 373 U.S. 526, 537-38." (App. Br., p. 52)

The *Watson* case if relevant to this action is supportive of appellees Holt, et al., and does not stand for the above proposition in any respect. *Watson* dealt with the desegregation of recreational facilities in Memphis. Memphis attempted to delay court-ordered desegregation on the ground of economic hardship. Reversing the court below, Mr. Justice Goldberg, speaking for the Court noted:

> Vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them . . . the city has completely failed to demonstrate any compelling or convincing reason requiring further delay . . . (pp. 537-539)

In furtherance of this incorrect argument, the city creates yet another non-existent legal theory that the "Attorney General is given status equal to that of the Courts to pass upon voting changes under Section 5." (App. B, p. 53) As clearly stated by this Court in *Allen v. State Board of Elections*, 393 U.S. 544:

> The Attorney General does not act as a court in approving or disapproving . . . (p. 549)

Nevertheless, the Solicitor General agrees "with the district court that in order to establish that the city 'has purged itself of a discriminatory purpose in an annexation of new voters, it [must demonstrate] by substantial evidence . . . that [it] has some objectively verifiable, legitimate purpose for annexation." (J.S. App. B, p. 20b)

b. Was the Economic Benefit Issue Directly Litigated Below? Did the City Prove Any Objectively Verifiable, Legitimate Reasons for the Annexation? Did Defendant-Intervenors Have a Full Opportunity to Rebut Such Evidence?

The answer to these questions, respectively is, yes, it was extensively litigated; no, the City did not prove legitimate reasons for the annexation; and, yes, not only did defendant-intervenors have a full opportunity

to rebut, but in fact fully established that there was absolutely *no* objectively verifiable, legitimate purpose for the annexation.

1. Was the issue of objectively verifiable purpose directly litigated?

The Government would have this Court believe that this issue was glossed over, not developed and that the Master and court below relied "solely" upon biased testimony from one witness. Such is simply not the case. The record before the Master and the court below ran in excess of 10,000 pages with hundreds of exhibits. At least 7,000 pages dealt directly with the economic and administrative benefits which could have been expected from the original area sought. Four days of testimony were taken in relation to the benefits or lack of them to be derived from the compromised annexation area, in addition to the testimony taken directly before the Master. Interrogatories and the answers thereto were before the Master and court below.

This evidence was stipulated into the record by the parties specifically for the purpose of having it before the court without the necessity of recalling all those witnesses again and creating a prohibitively protracted and expensive trial. The Master's hearing was held to update that evidence if possible and to add to it evidence as to remedy. Thus, the Master's hearing was no more than a hearing taken to complete the voluminous record already developed. Since 1971, the Holt Intervenors had been attacking this annexation with witnesses, evidence and by discovery on the very

issue that there was no objectively verifiable, legitimate purpose.

If the City concentrated on the ward plans during the Master's hearing, it was because all that could be said on the "legitimacy" of this annexation had been said and was already in the record.

The City had ample opportunity to come forward with any additional evidence which it could muster to establish the existence of non-discriminatory purpose (if any) justifying retention of the annexed area. The City failed to do so simply because it is impossible to do so.

The best example and corroboration of this fact is the method used by the City in reference to the Urban Institute Report, "The Impact of Annexation on City Finances".

This report was known to the City almost a year before the Master's hearing. The City had been subjected to extensive and damaging discovery on this issue in the instant case by the Holt Intervenors. The City knew the Holt Intervenors would again call Mr. Burnett as an expert on this very issue. (See witness list for Holt Intervenors) The City had the authors of the report on hand waiting to be called at the hearing if they were to introduce the report. Yet the City chose not to call the authors or introduce the report in support of their case or in rebuttal. Nor did they introduce any other rebuttal evidence to Burnett's testimony and the evidence in the record, even though all the high ranking, budget, finance, administrative heads and planners for the City were present. Subsequently, in argument to the three judges, the City quite improperly referred to the contents of the report. In printing the appendix to this Court, the City sought

again to bring in the report and reluctantly withdrew it under pressure. Yet in their brief, they selectively quote, most improperly, from the report.

Why would the City track such a patently improper evidentiary course? Because the report could never have withstood the glare of cross-examination, and, in fact, when the supportive facts underlying the report's conclusions are examined, the raw data destroys any lingering doubts which may exist that this annexation could possibly have any legitimate purposes. Further, both the Master and the court below did review the Urban Institute Report and concluded the report "could not in any case remove the doubts . . . " (J.S. App. B, p. 22b fn. 41)

2. Did the Annexation Have an Objectively Verifiable Legitimate Purpose?

Without reference to the plethora of evidence as to the discriminatory purposes already established, standing alone, this annexation utterly fails to serve any legitimate governmental purpose and, in fact, leaves the City in a position substantially worse than it was before the annexation.

There are two basic reasons why a city feels the need to expand: (a) need for vacant land for expansion, and (b) fiscal need for an improved economic base. A study of all the testimony and exhibits before the Master and court below and considered by them (J.S. App. B, p. 22b) compels the finding "that the City failed to establish any counterbalancing economic or administrative benefits of annexation." (J.S. App. B, p. 20b)

(a) The Question of Vacant Land

In determining whether this annexation satisfied the city's need for vacant land, it is necessary to examine what the City felt it needed, what it had, and what it actually received from this annexation.

Chief counsel for the City in the annexation trial, Horace Edwards, (himself a former Richmond City Manager and Councilman) summarized the City's position to the annexation Court:

> . . . during that period [1950-1960] the City gained almost 20,000 – 19,800 – in Negro population, but it lost 29,000 nearly 30,000 in its white population . . .
>
> The evidence will show that following the annexation of 1942 . . . Richmond was given an increase in its vacant land to 30 percent . . .
>
> . . . while this case has been pending in this court, the population in this area that we are seeking has increased 31,000 people [up from 42,000].
>
> The evidence will show . . . that any restriction whatever of the 51 square miles due to this unprecedented growth . . . will fall way short of meeting the needs for land and for development and growth in the City of Richmond in the reasonably near future, which according to those who are knowledgeable in the field is about 20 years. (ATR, Vol. 2, pp. 10, 11, 12)[1]

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[1] While counsel's comments are not evidence in the case in which they are made, they are significant here due to the technical background of this counsel and the fact that Mr. Edwards fought against the annexation settlement on the very grounds that it would not improve the City and would be economically adverse to the city's needs.

The City had to have all 51 square miles or it would not have sufficient vacant land to grow, attract industry, etc., etc.

The City has maintained that it could have taken a 1963 annexation award if its purpose was dilution. The evidence has shown that the City Charter did not allow bond sales for the purpose of paying for annexations at that time. But, nevertheless, assuming *arguendo* the City turned the Henrico award down on other grounds, the fact remains that a comparison of what the City would have received in the Henrico award with what it received in this annexation is very revealing. Especially is this so in light of the 30% vacant land goal expressed above.

Again, quoting Mr. Edwards:

> . . . In that case [Henrico] Council turned down the award that was given, the evidence will show, because the land awarded only increased the availability of vacant land in the City [by] 3.3 percent. . . . The evidence will show, it [vacant land] is down to 12.4 percent. This is gross land.
>
> The evidence will show that when you take out land, because of topography, of flood plains . . . the only thing that is left in the City now is *6.6 percent of vacant land*, which is seldom found in any city the size of Richmond anywhere in the land. (ATR Vol 2, p. 6)

Thus, prior to this annextion the City had 6.6 percent vacant useable land or 2.633 square miles (see App. B, p. 6) out of 39.89 square miles. The uncontroverted testimony is that in the annexed area, there exists 6.25 percent vacant useable land, (J.A. p. 527) or 1.475 square miles out of 23 square miles.

Thus, after annexation the City had 4.108 square miles of vacant, useable land, out of 62.89 square miles in the expanded City or only *6.53%* vacant, useable land, AN ACTUAL DECREASE from the 6.6% vacant land prior to the annexation.

The Henrico award was rejected because it only netted a 3.3% *increase*; this annexation was sought and accepted over the objection of the City's own lawyers despite the fact it resulted in a DECREASE of available vacant land, which itself was roughly 500% less than the 30% vacant land the City needed.

	Sq. Mi.	Useable Vacant Land (Edwards)*	Useable Vacant Land (City's Exhibit)**
Old City	39.89	2.633 sq. mi. 6.6%	2.553 sq. mi. 6.4%
Annexed Area	23.00	1.475 sq. mi. 6.25%	1.475 sq. mi. 6.25%
Expanded City	62.89	4.108 sq. mi. 6.53%	4.028 sq. mi. 6.41%

*Edwards' estimate ATR Vol. 2 p. 6

**City's exhibit ACX, A-2 "Net Vacant Land"

Note: The City's exhibit was included because the net affect would show a net increase to the City of 00.01% after annexation as opposed to a net decrease of 00.08% using the Edwards' estimate.

(b) The Question of Fiscal Impact

The City maintains that "the evidence relied upon by the Master and by the District Court cannot pass muster when stacked against the direct testimony of the City Manager [Kiepper]" (App. B, p. 58) and then suggests Kiepper's testimony to be "that the operations

in the annexed area result in an economic benefit to the City." (App. Br., p. 58)

Such is a knowing misstatement of the evidence, for when questioned directly on this point, the City Manager testified:

> Q. Are you making money off the annexed area now? Does it show a profit?
>
> A. No, sir.
>
> Q. You are losing money off it?
>
> A. Yes, Sir. (HTR, Oct. 19, 1971, p. 130)

The City, as does the Government, attempts to have this Court believe the Master and the court below relied solely upon Burnett's testimony at the Master's hearing. While such is simply not true (as evidenced above and by the fact that both the Court and the Master specifically note they considered all the *Holt* evidence as well as the Urban Institute Study [App. B, p. 56]) the fact remains that most fiscal references in the findings below refer to Burnett's testimony.

The obvious reason is that Burnett was substantially more generous to the City than the evidence previously introduced, or either the City Manager or Urban Institute's figures.

Mr. Burnett's use of per capita estimates, actually are born out by the City's fiscal experts and by the Urban Institute, as will be discussed below.

Obviously, the only way to study fiscal impact is to compare revenues and expenditures directly relating to the annexed area.

(i) Expenditures

In discussing expenditures, a distinction must be made between general operating budget expenditures and the capital budget expenditures.

The City quite properly observes that capital outlay is not a cost of government, only the debt service. (App. B, p. 57) This is an obvious reference to Mr. Burnett's testimony relating to expenditures for capital improvements in the area. Mr. Burnett estimated an annual cost of 3 million dollars. The City misread this testimony to mean capital outlay not debt service. However, the Urban Institute estimated this annual debt service expenditure to be approximately 2.9 million dollars (tables 23 and 25, pp. 47 and 51 Urban Institute Report). Mr. Burnett and the Urban Institute are thus in agreement as to this figure. The City expends 2.9 million dollars a year of capital expenditures.

The most accurate estimates of general operating expenditures per year are supplied by the City's own fiscal experts upon directed interrogatories.

The City is on a fiscal year from June 1 through May 31st. However, the City has controlled the annexed area since 1 January 1970. Thus, the following chart shows expenditures relating to the annexed area on a calendar as well as a fiscal basis.

General Fund Expenditures – Annexed Area*
Jan. 1, 1970 - March 19, 1973

Period of Time	Expenditure
Calendar 1970	23,927,499.38
Calendar 1971	20,196,359.34
Calendar 1972	28,398,373.30
Calendar 1973	Unavailable
Calendar 1974	Unavailable
Fiscal 1971-72	24,273,868.12
Fiscal 1972-73	23,274,775.74
Fiscal 1973-74	Unavailable
Average Calendar	24,174,077.34
Average Fiscal	23,774,321.93

*Source - Answers to Interrogatories of Holt Intervenors to City of Richmond filed by Robert Fary, Director of Finance, City of Richmond, 21 May 1973.

Thus, the approximate annual operating expenditure ranges between 24.2 and 23.8 million dollars a year in the annexed area.

The total annual expenditure in the City of Richmond in the annexed area is 26.7 million dollars.

Annual Expenditures – Annexed Area

Operating Expenditures*	Capital Expenditures**	Total
23.8 million (a)	2.9 million (b)	26.7 million

*average
**debt service, not capital outlay
(a) The lower average based on fiscal year; source: Richmond Director of Finance
(b) Source: Urban Institute, Melvin Burnett

(ii) Revenues

Again the City complains of Mr. Burnett's estimates relative to this issue. Burnett estimated revenue from real estate taxes was approximately 6.8 to 7 million dollars annually. (J.A. p. 528) The Urban Institute estimated revenues from real estate to be approximately $7,093,000.00 or 7.1 million dollars annually. (Urban Institute Study, Table 5, p. 18)

From this point on, Mr. Burnett is much more generous with his revenue estimates than either the Urban Institute or the City Manager.

The following table illustrates the comparative estimates on revenue.

Annual Revenues – Annexed Area

	Real Estate	Misc.*	Total
Burnett	7 million	14 million	21 million(a)
Urban Inst.	7.1 million(b)	9 million(c)	16.1 million(d)
City Manager	unknown	unknown	14.5 million(e)

*Misc. includes – licenses, utility, sales tax, personal property, machinery and tools, fines, forfeitures and delinquent taxes
(a) J.A., p. 528
(b) Urban Institute Study, Table 5, p. 18
(c) Urban Institute Study, Table 8, p. 22
(d) Same as (c)
(e) Keipper's highest estimate fiscal 71-72, (J.A. p. 388)

From the above chart, it is or should be apparent that the City should be happy with Mr. Burnett's testimony as he credits the area with producing 4.9 million dollars more per year than the Urban Institute and 6.5 million dollars more per year than the City Manager.

(iii) Net Loss or Gain

Obviously, by anyone's estimates the annexation has a decidedly adverse fiscal impact upon the City of Richmond. Inasmuch as costs inflate faster than taxes, this disparity will continue into the foreseeable future.

The comparison of impact is shown in the chart below:

Fiscal Impact – Annexation Area
Annual Deficit

Estimate	Total Expenditures*	Total Revenues	Annual Deficit/Loss
Burnett	26.7 million	21 million	(5.7 million)
Urban Inst.	26.7 million	16.1 million	(10.6 million)
City Manager	26.7 million	14.5 million	(12.2 million)
	Average annual loss:		(9.5 million)

*Source: Robert Fary, Director of Finance, City of Richmond, *supra.*

Thus, the City of Richmond has an annual fiscal loss of 9.5 million dollars a year in the annexed area.

Surely, in face of the enormous fiscal loss of 9.5 million dollars a year and the net decrease in available vacant land, the Master and District Court below were compelled to find that not only did the City fail to demonstrate any objectively verifiable, legitimate reason for this annexation, but the City could never show any justification for retaining the area.

The entire struggle by the City has been from the onset to retain the territory. If the territory is a fiscal and administrative loss to the City, then the desire to keep it must be based upon some other value that the territory has. There is no other value to the City, but

there is another value to the white power structure currently in control: that obvious value is that the territory contains in excess of 50,000 white citizens, who keep the black citizens in a substantial racial minority.

B. De-Annexation is an Effective And Reasonable Remedy

Obviously, in the abstract, if dilution exists, the most effective remedy is to remove the cause of the dilution. Especially is this so when the cause itself is an administrative and economic burden upon the citizens who have been diluted, as well as those who benefit from the dilution.

Outside the single issue of reasonableness, no party disputes that de-annexation is the most effective means of curing the dilution. (H. Tr. 190, 506, 507, 618) De-annexation also is the most efficient means of curing the impermissible purpose of the annexation itself. See *Gomillion v. Lightfoot*, 364 U.S. 339 and Dissent, Judge Butzner, *Holt v. City of Richmond*, 459 F.2d 1093.

Where a boundary expansion (devoid of benefit) was initiated and carried out as a purposeful device of racial disenfranchisement, any measure of relief which rewards the invidious purpose is by definition ineffective.

Contraction of the impermissibly expanded boundaries to their prior limits leaves no reward to the racially motivated expanders.

The City would urge that polarization and bloc voting would be aggravated by return to the at-large system and not even one representative could be

elected. In 1970 without the annexation, four black representatives would have been elected; three were actually elected. The ward plan would pit black ward against white ward. Representatives elected in each ward would be responsive to the needs of that ward only, which would guaranty a polarization of race without limit. With a return to at-large elections, the sizeable black vote would be a political force with which all officials would have to reckon and perforce cause them to be more responsive to the needs of all the races.

Contraction of the City boundaries to pre-annexation limits is not a voyage upon unchartered seas. It is a familiar concept to the parties in general and to Chesterfield County and Richmond in particular. Chesterfield has undergone several boundary contractions, i.e., de-annexations, in recent years, the latest involving the same territory which is the subject matter of this dispute. (MTR 675) The County Administrator (for 25 years) qualified as an expert both in local government (MTR 673, *et seq.*) and in the mechanics of boundary contraction. (MTR 675, 679, 680) His testimony went unrebutted and uncontradicted.

To be reasonable, boundary contraction must lend itself to speedy determination of the financial equities, administrative methodology of transfer and nonburdensome workable resolution of disputes which could arise. It took two weeks for the parties to determine the financial equities in the original City expansion-County contraction. (MTR 687) It would take no longer than thirty days to again determine the financial equities administrative methodology of transfer and effectuate full transfer of governmental services. (MTR 683, 684, 687) The State annexation court remains in session under state law to act as arbiter for the resolution of any issues which would arise from the annexation, and is, therefore, a proper arbiter for resolution of any issues arising out of the boundary contraction. Being existent, local, operative machinery, its utilization would be nonburdensome.

To be reasonable, there must be no disruption of governmental services, requiring, therefore, a corresponding ability of the County to assume these services financially and administratively. Chesterfield County has 18 million dollars in the bank, pursuant to a recent sewer bond sale, 10 to 12 million dollars due from the State Water Control Board, 4 to 5 million dollars in the water fund, 1 million dollars of authorized school bond issue, and a normal bank balance of 20 million dollars at all times. (MTR 688, 689) All Chesterfield capital outlays with the exception of schools and utilities are paid from current revenue. (MTR 689) Bonds issued by the City for capital outlays could be assumed by the County. (MTR 689) The City has spent only 7 million dollars in capital outlays in 2½ years. (MTR 695) The County possesses sufficient financial ability to reassume control. Administratively, the County is amply prepared to assume all services: the county school system is innovative, advanced and capable of reabsorbing the children (MTR 682); the County would have no problem utilizing the City constructed fire stations, and has just expanded its fire department in personnel and equipment. (MTR 682) The City uses a different hose connection thread than the rest of the County, but converters could be carried on trucks until the threads were replaced. (MTR 686-87) The County Police

Department has a waiting list and sufficient manpower with initial overtime scheduling to provide protection during its expansion. (MTR 683) The garbage and trash collection is handled now by the same private contractor previously contracted by the County and would continue after transfer. (MTR 684) The County has a better water supply than the City and could use almost every waterline installed by the City. (MTR 685-86) The County can use every foot of sewer line installed by the City; most of the sewer lines installed by the City were on County developed plans. (MTR 686) The records of utilities, assessments, taxes, etc. of the area are computerized and can easily meld from the City to the County computer, while continuing normal governmental functions. (MTR 685) The County has doubled the size of its jail, increased the mental health program and would experience no difficulty in the administration of jails, courts, probation, mental health, welfare or social services in the event of transfer. (MTR 691) Chesterfield County is willing to reassume governmental control over the subject area. (MTR 697, HHX 37, MHX 2)

To be reasonable, there must be no substantial economic deprivation to the City and no corresponding unjust enrichment to the County. The County does not expect to be enriched by an order of de-annexation. (MTR 682) The City has spent only 7 million dollars in the annexed area to date, with 21.3 million dollars which must be spent within the next 2½ years (MTR 695) and has an *annual average net* financial loss of 9.5 million dollars. The return of the area would thus save the City at least 9.5 million dollars per year of operating loss, 21.3 million dollars of required capital

outlay, and would realize bond assumptions and cash reimbursements in excess of 7 million dollars. In light of the inconsequential growth potential of the area (6.503%), the City would economically benefit by a return of the area to the County.

In the context of the Voting Rights Act, the black Vice Mayor of the City of Richmond and member of the Crusade had these observations when questioned by the court about the problems of de-annexation:

> . . . I think that these inconveniences and these other things [losing land, tax, schools] should not be permitted to overcome the Voting Rights under the Constitution . . . I think that *having a territory in the city would not help the city that much,* if the priorities of the city are not based properly in satisfying the substance of the Voting Rights Act.
>
> I think that *having extra territory* with the priorities fixed as they were in the past, *would not be in the interest of the black person.* [emphasis supplied] (MTR 619-20)

Contraction of the City boundaries, i.e., de-annexation, is a reasonable remedy and a remedy which will effectively cure the dilution and furthermore cure the impermissible racial motive of the boundary expansion.

C. The City's Ward Plan and Ward Plans in General Are Ineffective As a Remedy in the Context of a Purposeful Dilution By An Illegitimate Annexation

1. The Population Percentage Shell Game

The City plays a shell game with the unrestrained interchange of total population percentages with

voting-age percentages. The City uses voting-age percentages without reference to the percentages of blacks just below and soon to be translated into voting-age nor adjusted for frequency as percentages of blacks who vote compared with whites. Then the City blithely returns to total population percentages in characterizing its wards as white or black.

As the Court noted:

> The fact that the percentage of Richmond blacks of voting age is appreciably less than the percentage of blacks in the total population of course means that there are proportionately more black youngsters. We, *like the white political leadership of Richmond,* can anticipate that the present black population majority within Richmond's old boundaries will translate in a few years into a voting age majority. In an at-large system, such a majority would ensure that none of the nine City Council seats was occupied by a candidate who appealed only to a white voting bloc, ignoring the needs and aspirations of Richmond's black citizens.

2. Access to the political process, not population, is the barometer of dilution.

In any event, a resort to mathematical comparisons of registered voters, voting age population, a total population, while relevant in redistricting cases, is not relevant here.

We are concerned "with the reality of changed practices as they affect Negro voters." *Georgia v. U.S.*, 411 U.S. 526, 531.

The court below put it most succinctly when it stated: "We must look beyond percentages, whether they be of total populations or of voting-age populations, to determine the effect of the boundary expansion on the voting power of blacks and their access to the political process. As the Fifth Circuit has recently stated:

> ***Inherent in the concept of fair representation are two propositions: first that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. Both the Supreme Court and this Court have long differentiated between these two propositions, and although population is the proper measure of equality in apportionment, in *Whitcomb v. Chavis,* 403 U.S. 124, 149-50, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971) and *White v. Register, supra.*, 412 U.S. at 765, 93 S.Ct. at 2339, 37 L.Ed.2d at 324, the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength . . ."

(J.S. App. B, p. 25b, see also *Zimmer v. McKeithen,* 485 F.2d at 1303 and *Beer v. U.S.*, 374 F.Supp. at 384)

3. Ward plans are a wholly inadequate remedy.

The interesting point is that the entire discussion of the ward system has as its basis an improper assumption. That is that the area should remain

annexed, that given the assumption the area is worth keeping, than "whole-hearted good faith attempt[s] to neutralize dilution" (Appellants brief, p. 47) should suffice.

It is as if a company had to be taken over forcibly and one of the bandits were later heard to say to the court "I should be able to keep the company if I make a 'wholehearted good faith attempt' to pay good dividends to the stockholders."

The *Petersburg* case did not stand for this proposition. There, in the context of a legitimate annexation, the most reasonable remedy was a ward plan. Here, in the context of an illegitimate annexation and purposeful dilution, the most reasonable remedy is not concerned with retaining the territory.

In any event, an examination of the ward plan finds it wholly lacking even as to the purposes the City would ascribe to it.

The City's Ward Plan does not cure any of the dilutive effects of the annexation (much less the question of impermissible purpose), but rather focuses that dilution in the "swing" ward, Ward H, (the four black and four white wards allegedly cancelling each other out.) (MTR 613)

Thus, the fight for political control centers in Ward H. The racial percentages in Ward H on a general population basis are 59.1% white and 40.9% black. (MTR 615, MCX 15-19) Prior to annexation, the percentages were 52% black and 48% white. After annexation, the black percentage was diluted by 10 percentage points to 42% black. The City Ward Plan thus dilutes even more than the annexation itself. (MTR 616) The net effect then under the City's Ward Plan is

to reflect even greater dilution than that caused by the annexation itself. The use of voting-age population figures is an obvious attempt to change the pre-annexation demography of the City from that of 52% black to 44.8% black. This approach is fallacious on three grounds.

First, "voting-age population" ignores the fact that the Voting Rights Act and the case law deals with *voting potential, Georgia v. U.S.*, 93 S.Ct. 702. To ignore the under 18 population is to exclude all data relevant to voting potential.

Secondly, the objectors refer to "voting age population" ONLY when speaking of the total City population, then blithely return to straight population figures when comparing wards and their racial composition or when seeking to identify which wards and how many will elect black representatives.

Third, the "voting-age population" approach totally ignores other relevant data such as the percentages of each race which generally vote in elections, future growth potential, death rates, etc.

The City's Ward Plan is also unreasonable in that it is designed as a temporary remedy until such time as Section 5 of the Voting Rights Act expires. A referendum under the diluted at-large system would later be held in order to allow the abandonment of the ward system. (MTR 184, MHX 1, J.A. p. 180)

It must also be recalled that the Master had before him Mayor Bliley's admission that he had, in effect, proposed the easy and early circumvention of the ward plan (which the plaintiff claims it is so eager to adopt) by an *at-large* referendum as soon as Section 5 of the Voting Rights Act expires. The Master could hardly be

expected to approve the "solution" of a ward plan when one of the plaintiff's chief spokesmen has indicated that it can be discarded like so much rubbish once Section 5 expires. Not only did the Mayor's suggestion illuminate the ineffectiveness of the ward plan remedy, it also laid bare the continuing racial motivation of the plaintiff in seeking approval of this annexation.

4. The Ward Plan is not a correct, fairly-drawn plan.

The record amply demonstrates that the City's own Ward Plan (MCX 15, J.A. 121) does great violence to its self chosen criteria of boundaries, neighborhoods, etc. (MTR 144, 150, 158, 159, 174-177, 492, 496-97, 505)

The City Plan reflects no political considerations. (MTR 433) The communities of interest are defined by the City as being concerns with facilities and services (MTR 429) or that needs-services is another way of saying income, black areas, racial. (MTR 433) To draw voter districts, these needs-services would be the issues motivating voters and yet the City has not drawn its wards with these considerations in mind. (MTR 483, 485, 489, 490)

Furthermore, the architect of the plan had no racial data to work from. (fn. 8, Appellant Brief, p. 48) If his purpose was to cure dilution and make access to the political process meaningful, he would have had to have that information to make any significant attempt.

In the context of past discrimination and the invidious racial motivation, ward plans do not even

address the question of how to cure the impermissible purpose. Nowhere in the record is there any explanation or supportive evidence to show how purpose is cured or even affected. The ward plans leave unresolved the dilution itself without reaching the impermissible motive.

In that by their own terms the ward plans leave unchanged the dilution in any substantial degree or merely make that dilution worse, they are ineffective. In that they do not reflect logical and generally acceptable criteria, they are unreasonable. In that they leave untouched the question of motive/purpose, they are both ineffective and unreasonable.

The Court in *Beer II, supra.* put it well when it stated:

> In determining the impact of a redistricting plan upon the voting capability of a racial minority, the relevant comparison is between the results which the minority is free to command and the results which the plan leaves the minority able to achieve. A substantial difference between the two, not justified by a compelling governmental interest is unconstitutionally enervating. (*Beer, supra.* at 388)

Even the appellant tacitly admits that its ward plan would leave the black voters a *maximum* of *four* (4) of the city of Richmond's *nine* (9) councilmanic seats. While it is true that prior to the illegal institution of the covert, compromised annexation by appellant, blacks constituted only 44% of the voting age as shown by a 1970 census, the percentage of blacks in the total population was *greater* than the percentage of whites in the total population and would (as the court found), if indeed it has not already done so, in a few years

translate itself into a voting-age majority. (J.S. App. B, 23b-24b) Further, appellant's ward system *guarantees* a white-controlled City Council while there "... is good reason to think that blacks would have a *greater* opportunity to elect five councilmen responsive to their concerns and interests in an at-large system within Richmond's old boundaries than in a ward system operated within the [illegally] expanded boundaries." (J.S. App. B, 25b-26b)

While it is true that wards do guaranty seats on council, more importantly, *wards guaranty a limit* to the number of black seats on council and severely limit the *potential* growth of black voting influence on council.

The purpose of the act was to prevent disenfranchisement, not crystalize and establish an arbitrary status quo. Richmond blacks were well on their way to ever increasing representation. This annexation was sought to prevent and delay that growth. Ward plans are only a slightly less effective delay and as such are themselves merely a second line defense of white supremacy and a first line defense of personally motivated black political bosses who would insulate themselves in pocket boroughs.

D. The Question of Purpose Was Not Settled in the Appeal of Holt I

The City asserts that the question of its purpose in annexing twenty-three (23) square miles of Chesterfield County and its overwhelmingly white population has been settled in its favor in *Holt v. City of Richmond, et*

al., 459 F.2d 1093 (4th Cir. 1972), *cert. denied*, 408 U.S. 931 (hereinafter referred to as "Holt I Appeal"). The City goes on to claim that the majority opinion in *Holt I Appeal* collaterally estopped the Court below from inquiring into the City's purpose in instituting its covered change in voting practice and procedure.

Such is not the case. For the following reasons the doctrines of *res judicata* and collateral estoppal are not applicable to the instant case:

1. The court below was not limited and did not limit itself to consideration of the evidence regarding purpose developed in *Holt I Appeal*, but considered additional, competent and persuasive evidence of the City's continuing impermissible purpose.

2. *All* parties in *Holt I*, *Holt I Appeal*, and the *Holt I* appellate Court agreed that the appellate court had no jurisdiction to consider any question arising under the Voting Rights Act.

3. The application of the principles of *res judicata* and collateral estoppel to the instant case would work a profound injustice.

4. Congressional policy indicates a clear intent to invest the court below with the exclusive and overriding obligation to inquire into the issue of the purpose underlying a covered change in voting practice and procedure.

1. The court below was not limited and did not limit itself to consideration of the evidence regarding purpose developed in Holt I Appeal but considered additional, competent and persuasive evidence of the City's continuing impermissible purpose.

The record presented in *Holt I* was enlarged upon in the Court below in a lengthy hearing before a specially

appointed Master. In addition to the compelling evidence of impermissible purpose presented in *Holt I*, the three-judge court below had before it the testimony of the City's own mayor wherein he admitted that a scheme had been devised whereby the requirement of a ward system could be circumvented upon expiration of the Voting Rights Act by resort to an at-large referendum on the question of whether the City should again resort to at-large voting in councilmanic elections. (See Argument C, *supra.*)

The Court below could not ignore this *new* evidence of the white power structure's continuing desire to dilute the black vote.

Moreover, the record below indicates a great reluctance on the part of the City to adopt *any* ward plan. That reluctance was itself further evidence of the City's impermissible purpose in enacting and seeking to retain its covered change in voting practice or procedure.

The relative ease with which the intervenor Crusade for Voters was able to devise a ward plan that went much further than the City's plan in alleviating the impermissible dilution caused by the annexation quite naturally warranted an inference that the City, in drafting its own ward plan, had not abandoned its impermissible purpose of diluting the black vote to the greatest extent possible (without, of course, losing the support of the Justice Department). The Court below, moreover, could not overlook the City's adamant opposition in *Holt I* to the acceptance of any ward plan that could have alleviated to any extent the purposefully devised dilution of black voting power.

The doctine of collateral estoppel requires, *inter alia*, identical evidence, "the determination of an issue by a judgment is not conclusive in a subsequent action involving the same issue as that involved in the prior action if since the bringing of that action there has been such a change of circumstances that the ground for the determination of the prior action is no longer controlling. (See § 54, Comment d) The collateral estoppel is effective only as to the determination of *the facts as they were when the first action was brought or determined.*" (emphasis supplied) Restatement, *Judgments*, § 68, Comment q, p. 312-13

2. All parties in Holt I and the Holt I appellate Court agreed that the appellate court had no jurisdiction to consider any question arising under the Voting Rights Act.

The City's claim to a collateral estoppel effect from the *Holt I* majority decision is totally at odds with the position it formerly took in that case before the Fourth Circuit and constitutes a breach of a clear understanding with that appellate court:

> At the request of the parties [including the City], we have proceeded to hear and decide the Fifteenth Amendment question, notwithstanding the fact that the Attorney General has filed an objection under the Voting Rights Act of 1965. *We have no jurisdiction to consider any problem arising under that Act*, and what we have said reflects no opinion as to the appropriateness of the Attorney General's objection. (459 F.2d 1100 [majority opinion])

Earlier the entire court, sitting *en banc*, had occasion upon a motion for clarification by Holt to express the scope and effect of its inquiry:

> This Court is only concerned with the Fifteenth Amendment questions arising out of the plaintiff's contentions, the plaintiff having disclaimed any reliance upon the Voting Rights Act of 1965 and any intention of invoking its remedies in this proceeding . . .
>
> The stay order does not affect in any way the objection of the Attorney General of the United States under the Voting Rights Act of 1965, and *neither it nor anything else done in this Court affects the rights of any party under the Voting Rights Act of 1965 or limits the obligations of or restrictions upon, any such party which arise out of the Voting Rights Act of 1965.* Order, March 1972, *Holt I Appeal, supra., en banc* (emphasis supplied)

The City itself agreed in response to interrogatories propounded by the *Holt I Appeal* Court stated:

> In this connection see the Supreme Court's reasoning in *Allen v. State Board of Elections*, 393 U.S. 544, 560, 22 L.Ed.2d 1, 14 (1969), where the complaint initially claimed violations under the Voting Rights Act of 1965 and the Fifteenth Amendment but the parties by stipulation removed the question of the Fifteenth Amendment prior to a hearing in the district court so that the case was submitted solely on the question of the applicability of the Voting Rights Act of 1965. If the parties might remove the Fifteenth Amendment question by stipulation, *it would follow that the plaintiff-appellee here could elect not to pursue a question arising under the Act* . . . the issues presented *arise solely* under the Fifteenth Amendment. (pp. 4, 13, *"Memorandum of Appellants in Response to Questions Presented by this Court by Letter Dated February 2, 1972"*, filed *Holt I Appeal, supra.*)

The City is thus playing another shell game with the issue of its impermissible purpose. In *Holt I Appeal* it argued rather successfully that the issue of impermissible purpose was irrelevant and only arose in the context of Voting Rights Act litigation. In deference to the preeminent position given the special three-judge court provided for in § 1973c of the Voting Rights Act, the Fourth Circuit accepted the City's reasoning and abstained from passing upon the central issue of purpose. Now, however, in a bald reversal of its previous position, the City would have this Court believe that *Holt I* decided the central issue of purpose even though at the City's own urging the Fourth Circuit denied any such intent or effect in its decision.

Where it is contemplated by all parties that subsequent litigation is required to settle an issue, prior litigation cannot be invoked under the principles of *res judicata* and collateral estoppel to bar a full inquiry into the issue relevant to that subsequent litigation:

> In our view the doctrine of collateral estoppel is not applicable where, as in this case, one ground of a judgment does not finally adjudicate the case on its merits but operates, much like a common law plea in abatement, to permit continued or further litigation upon an appropriate amendment or refiling, if relief continues to be withheld. In that event, a party may acquiesce in the judgment and take whatever steps are necessary to keep alive or rekindle his prayer for relief without being bound or estopped on the merits, and without

being required to burden the appellate courts with an essentially futile appeal. (*Stebbins v. Keystone Insurance Company*, 481 F.2d 501, 508 [C.A.D.C. 1973])

As both the City and Fourth Circuit obviously expected they would do, the *Holt* class rekindled their complaint by intervening in the instant litigation required under § 1973c of the Voting Rights Act. Essentially, the holding in *Holt I* merely caused an abatement of that class's complaint until the proper judicial remedy became available through congressionally mandated litigation.

3. The application of the principles of res judicata and collateral estoppel to the instant case would work a profound injustice.

It is well settled that the principles of *res judicata* and collateral estoppel are never to be invoked where to do so would result in an injustice. Restatement, *Judgments*, § 70, p. 318-19. 66 Harv. L. Rev. 1, 29 "Collateral Estoppel by Judgment" by Austin Wakeman Scott ("Care must be exercised in its [collateral estoppel's] application to see that it works no injustice.")

> Since a failure in advocacy, the drawing of a wrong inference or a mistaken application of law may result in an erroneous finding, care must be taken to restrict collateral estoppel to those situations in which the advantages to be derived from preventing relitigation will not be outweighed by the injustice that may result by forclosing

> attack on prior determination. (65 Harv. L. Rev. 818, 840, "Developments - Res Judicata")

In *Holt I Appeal*, the Fourth Circuit majority viewed the issue of invidious racial purpose in adoption of the annexation as, at best, peripheral. In fact, that majority went so far as to say that "suspect legislative motivation" was irrelevant to the legality of "facially constitutional" legislation. (459 F.2d at 1098) Having so stated its view of the law in the context of a Fifteenth Amendment suit where all consideration of the Voting Rights Act had been specifically exluded by stipulation of the parties, the Fourth Circuit did not and had no reason to give careful scrutiny to the question of the City's purpose in adopting the annexation. In his dissenting opinion in *Holt I Appeal*, Judge Winter was quick to note that the majority had not been overly concerned with the evidence of invidious racial purpose underlying the adoption of the annexation by the City:

> The opinion of the majority may be read in vain for any adequate discussion of these findings [of invidious racial purpose by the district court] and any demonstration that they are clearly erroneous. Yet they are the crux of the case. The majority simply takes the position that the evidence to support them is extraneous to the issue. (259 F.2d at 1109)

By contrast, in congressionally mandated litigation under Section 5 of the Voting Rights Act, there is no such thing as "facially constitutional legislation." The legislative motivation in the adoption of such covered legislation is inherently suspect. If anything, legislation affecting voting is "facially unconstitutional." The

burden rests upon the covered state or its governmental subdivision to demonstrate that the covered change wrought by that inherently suspect legislation does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race. This was the issue before the three-judge court below. Quite naturally, it received a closer and more careful scrutiny than had been the case in *Holt I Appeal.* Elevating the casual remarks in the *Holt I Appeal* majority opinion to the status of a collateral estoppel effect would amount to a denial to the black intervenors of the full and intended benefit of the Voting Rights Act.

> [T]he prior judgment will not foreclose reconsideration of the same issue if that issue was not necessary to the rendering of the prior judgment, and hence was incidental, collateral, or immaterial to that judgment. [citations omitted] . . . [T]he decision on an issue not essential to the prior judgment may not have been afforded the careful deliberation and analysis normally applied to essential issues, since a different disposition of the inessential issue would not affect the judgment. *Irving National Bank v. Law,* 10 F.2d 721, 724. (2nd Cir. 1926) (L. Hand, J.).
>
> * * *
>
> [I]f the Court in the prior case were sure as to one of the alternative grounds and this ground by itself was sufficient to support the judgment, then it may not feel as constrained to give rigorous consideration to the alternative grounds. Note, Developments in the Law, Res Judicata, 65 Harv. L. Rev. 818, 845 (1952). (*Halpern v. Schwartz,* 426 F.2d 102, 105 [2d Cir. 1970])

The *Holt I* decision is a valuable reminder of the relative impotency of traditional Fifteenth Amendment remedies when invoked against the more subtle and sophisticated forms of voter discrimination. It was this proven impotency of traditional Fifteenth Amendment remedies that spurred the passage and helped sustain the constitutionality of the Voting Rights Act. It is well nigh universally conceded that the passage of the Voting Rights Act expressed congressional dissatisfaction with the availability and effectiveness of traditional remedies for discrimination in voting:

> Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. (*South Carolina v. Katzenbach,* 383 U.S. 301, 328 [1966])
>
> The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. . . . We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the § 5 approval requirements. (Allen, *supra.*, 393 U.S. at 365-66)

To now deny the black intervenors the advantages secured to them under the Voting Rights Act on the grounds of *res judicata* or collateral estoppel because of their good faith pursuit of an admittedly inferior

traditional remedy would constitute a manifest injustice.

4. Congressional policy indicates a clear intent to invest the Court below with the exclusive and overriding obligation to inquire into the issue of the purpose underlying a covered change in voting practice and procedure.

The City argues, in effect, that a decision reached under traditional Fifteenth Amendment case law operates by means of *res judicata* and collateral estoppel to bar all subsequent inquiry into the issue of its impermissible purpose in adopting a particular annexation:

> On the contrary, § 2 of the Fifteenth Amendment expressly declares that "Congress shall have power to enforce this article by appropriate legislation." By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* [emphasis in original] the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective." Ex Parte Virginia, 100 U.S. 339, 345, 25 L.Ed. 676. Accordingly, *in addition to the Courts*, [emphasis supplied] Congress has full remedial powers to effectuate the Constitutional prohibition against racial discrimination in voting. (*South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 [1966]).

A congressionally desired, genuine and independent inquiry into the discriminatory purpose and effect of a

covered change by the United States District Court for the District of Columbia is "congressionally mandated."

> . . . Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General – the determination whether a covered change does or does not have the purpose or effect of "denying or abridging the right to vote on account of race or color." (*Perkins v. Matthews*, 400 U.S. 379, 385 [1971])

This clearly recognized congressional intent should not be sidestepped by resort to a mechanistic and unjust application of the doctrines of *res judicata* and collateral estoppel.

E. The "Extra Burden" Argument of The City is a Quibble of Semantics

The City would have this Court believe the court below engrafted "additional", i.e., "extra", burdens of proof beyond that required by law onto Section 5. Such is simply not the case. The City must carry its burden on both "purpose" and "effect." (See, e.g. *City of Petersburg, supra.*, at p. 1027)

There was no increase of burden placed on the City. As a fact, the lower court really relaxed the statutory burden relative to proof by allowing the City to "purge" itself of that taint though it had utterly failed to prove the absence of that taint. The statute says that the City must prove its changes do *not* have the purpose of denying or abridging the right to vote. The court below stretched the rule to say that if the City could not meet its burden directly, then an alternative

would be to show an eliminated effect coupled with some legitimate reason to justify retaining the area.

The court thus placed a "lesser" burden on the City, not an "extra burden."

The City would further suggest that the Court below would require racial gerrymandering. The Court never suggested that one race be granted representation out of proportion to its weight. The fact that the City had to prove some legitimate reason to justify retention of the area in no way relates to the question of proportionate representation. Had the court desired this result, it could have simply adopted a five or six black ward system. As the court pointed out:

> Richmond seems to interpret *Petersburg* to mean that, where a city elects its city council under a ward system, any expansion of its boundaries can defeat a § 5 challenge. This interpretation not only is contradicted by the plain language of *Petersburg*, requiring the city to "neutralize *to the extent possible* [emphasis in original] any adverse effect upon the political participation of black voters," 354 F.Supp. at 1031 (emphasis added), but also collapses under simple analysis. For *if Richmond's position were adopted*, the incumbent white political leadership of a city which already elected its councilmen under a single-member district ward system *could, without running afoul of §5, selectively annex as many additional white wards as it anticipated it needed to maintain the city's white political predominance*. Surely Congress *did not intend* § 5's "severe * * * procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws," *Allen v. State Board of Elections, supra* note 3, 393 U.S. at 556, *to be so easily circumvented*. (J.S. App. B, 28b) [emphasis supplied]

F. The District Court Did Not Improperly And Erroneously Ignore the Attorney General's Approval of the City's Nine-Ward Plan

The City asserts that the court below improperly and erroneously ignored the Attorney General's approval of the City's Nine-Ward Plan. This is simply not the case. The City makes the bland assertion that the Attorney General's approval of the nine-ward plan was ignored, but addresses no evidence from the record to support that assertion. Naturally, the City is rankled by the refusal of the court below to acquiesce in the *endorsement* of the nine-ward plan by the Attorney General. Once suit was filed in the court below seeking a declaratory judgment that the annexation did not have the purpose and would not have the effect of abridging the right to vote on account of race, the Attorney General, by the express terms of the act, lost jurisdiction to approve the proposed voting change. Moreover, § 1973c does not speak, as the City would have one believe, of the Attorney General's "approval." Instead, it speaks of the Attorney General's "*failure to object*" (emphasis supplied) to such proposed change. Further, the Act provides that the failure of the Attorney General to object to a proposed voting change cannot bar a subsequent suit to enjoin the enforcement of that voting change.

One is at a loss to know what degree of deference the City would have had the court below pay to the Attorney General's endorsement. The failure of the court to defer to the opinion of the Attorney General does not constitute error unless there is some rule of

law or statute that requires that a § 1973c court defer to his opinion. There is none.

The court below had the responsibility of determining whether the annexation as modified by the nine-ward plan was for the purpose and would have the effect of denying or abridging the right to vote on account of race or color. The court below could hardly ignore the Attorney General's endorsement of the nine-ward plan. Aside from endorsing the nine-ward plan, the Attorney General played an entirely passive role in the proceedings below. If the court below was aware of anything emanating from the Attorney General, it had to be his endorsement of the nine-ward plan.

Congressional enactments providing for a three-judge court are to be strictly construed. *Allen v. State Board of Elections*, 393 U.S. 544, 561 (1969). § 1973c provides for the convening of a three-judge court to make a determination regarding a covered change to which the Attorney General has interposed an objection. This three-judge court must fulfill its statutory obligation in that mandated litigation and cannot defer to the judgment of a mere litigant. The record indicates that the three-judge court below performed its congressionally mandated duty in a thorough and conscientious manner. Its inquiry only began with acknowledgment of the Attorney General's endorsement of the nine-ward plan. It gave the annexation and its belatedly engrafted ward plan the careful scrutiny intended by the Act's Framers. It carefully considered all of the evidence regarding both the effect and the purpose of the annexation as modified by the nine-ward plan. The court below was also aware that the City had

a curious and largely unexplained aversion to drawing any ward plan that caused as much as a single ward to straddle the James River. The three-judge court knew that this self-imposed and irrelevant concern prevented the City from adopting a ward plan which more nearly cured the impermissible dilution of the black vote. The Attorney General's apparent willingness to ignore these and other relevant considerations did not make them any less compelling to the court below.

G. The Court Below Made Its Findings of Fact Upon a Voluminous Record which Fully Supported Its Determination that Richmond Had Not Complied with the Act

The City alleges that no one, including the Holt Intervenors, understood that the annexation was covered by Section 5. Holt began seeking assistance from the Attorney General as early as 1969 and even sent a telegram to Mr. Justice Douglas in the late fall of 1969, seeking a reversal of the annexation decree which was then on appeal on the very grounds that it diluted his vote.

Further, the City knew that the Voting Rights Act covered all schemes no matter how subtle which were intended to abridge the right to vote. The City and its attorneys were intimately familiar with the purpose of this compromised annexation. To claim that they had no idea Section 5 covered schemes to disenfranchise is absolutely preposterous. What they really are saying is that they thought their invidious little scheme would work and that they had no idea the court would

specifically point to the annexation subterfuge as it did in *Perkins v. Mathews*, 400 U.S. 379.

It is of significance that while the City complains mightily of error by the court below, the appellant's brief is almost totally devoid of any meaningful references to the record to support their position. Nor does the City ever point out any specificity to any real factual or legal errors by the court below.

The simple facts are that the evidence is so overwhelmingly against them on every point that the City could never hope to meet its burden under the Act.

Even the City's attempt to disclaim their delay in this entire litigation falls flat. A quick reference to the course of the proceedings makes it abundantly clear that the City has merely continued the very practice which Section 5 sought to prevent. It has used the enormous financial and legal resources of the City to delay and frustrate the legitimate claims of its disenfranchised citizens, thereby again shifting the intolerable financial and time burdens to them that Section 5 was supposed to prevent.

H. CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgment of the lower court should be affirmed, but because all the issues have been thoroughly litigated and the delay has continued so intolerably long, this Court should declare the proper remedy and remand the case for action consistent

therewith. It is further respectfully submitted that de-annexation is the most reasonable and effective remedy to cure the instant problem, reinstate the franchise to all the citizens of Richmond, and uphold the sanctity and force of § 5 of the Voting Rights Act of 1965.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have served counsel of record with the foregoing Brief, by mailing, postage pre-paid, this 10th day of April, 1975.

W. H. C. VENABLE